IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4725 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA SD/-

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

BHRAHMAN SHRIRAM KESHARA

Versus

STATE OF GUJARAT

Appearance:

MR RAJESH M AGRAWAL Advocate for Petitioner

MR DC DAVE ADDL PUBLIC PROSECUTOR

for Respondent.

CORAM : MR.JUSTICE D.G.KARIA

Date of decision: 13/12/96

ORAL JUDGEMENT

Rule. Mr.D.C.Dave, learned Addl. P.P. waives the service of Rule for and on behalf of the State.

2. The petitioner who is the accused for the offence under Sec.17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the N.D.P.S.Act") has

been alleged to have been in possession and/or selling the opium. It is the prosecution case that on raiding the house of the petitioner and on search in presence of the present petitioner, one plastic bag concealed in earthern pots, containing 925 grams of opium was found. The said quantity of opium was found, divided into 26 pieces. On inquiry about the said contraband article, the petitioner could not show any valid licence for possession of the said quantity of opium. The Investigating Officer, therefore, having followed the necessary formalities, arrested the petitioner on 24th April 1996 for the offence under Sec.17 of the N.D.P.S.Act.

3. The petitioner had earlier filed Misc. Criminal Application No. 399 of 1996 in the Sessions Court, Banaskantha at Palanpur. The learned Additional Sessions Judge, Banaskantha at Palanpur rejected the said bail application on June 13, 1996. The petitioner, thereupon, preferred Misc. Criminal Application No. 3624 of 1996 in this High Court. However the same was withdrawn on behalf of the petitioner on August 30, 1996. According to the petitioner, the said application came to be withdrawn in the High Court as the chargesheet was not submitted at that time. The petitioner, thereafter filed Misc. Criminal Application No. 721 of 1996 for grant of bail in the Sessions Court, Banaskantha at Palanpur after filing of the chargesheet in the matter. The learned Additional Sessions Judge, Banaskantha at Palanpur who heard the said bail application, rejected it by his judgment and order dt. September 21, 1996. The petitioner thereupon preferred the present application for grant of bail.

4. It appears that on 4th November 1996, the learned counsel for the petitioner withdrew this petition and on 4th November 1996, this court (Coram: S.D.Dave, J.) passed the following order :

> Ld.Counsel for the petitioner seeks the permission to withdraw the petition as this happens to be a successive bail application after the filing of the chargesheet. Permission is granted. Petition stands disposed of as withdrawn. Notice shall stand discharged."

However, before the aforesaid order could be signed, the learned advocate Mr. Agrawal submitted that the present application could not be said to be successive bail application as it was filed after filing of the chargesheet and therefore, this court (Coram:

S.D.Dave, J.) passed the following order on 4th November 1996:-

I have pronounced the orders in the Court, today.
But, before the said orders could be signed, learned Counsel Mr. Agrawal says that, the present application cannot be said to be a successive bail application. There is a request not to sign the above said orders. I have not signed the said orders. The matter is to stand over to 27th November, 1996".

5. In the above circumstances, this bail application was heard wherein Mr. R.M.Agrawal has argued at length for two days and cited several authorities. I have also heard Mr.D.C.Dave, learned APP for the respondent State. I have also perused the Police papers.

6. Mr.Agrawal has made out as many as 34 grounds in the application in support of grant of bail to the accused. However he has asserted some of those grounds only.

7. Mr.Agrawal submitted that the accused was not present at the time of alleged recovery of opium and that the investigation is mala fide. On perusal of the Police papers, I am unable to accept the submission of Mr.Agrawal. It transpires from the material on record that the opium weighing 925 Gms divided into 26 pieces worth Rs.5550/- was recovered in presence of the petitioner and the panchas as well. A map of the scene of offence i.e. the house from where the contraband opium recovered is also prepared. The Investigating Personnel prima facie appears to have completed the mandatory provisions of the N.D.P.S.Act. The documentary evidence on record does suggest that the premises from which the contraband opium was recovered was of the ownership and occupation of the present petitioner. There is also a F.S.L. report indicting that on analysis, the sample of the recovered article was found to be certified asthe opium. The learned Additional Sessions Judge has given cogent and convincing reasons in the impugned judgment in rejecting the bail application of the petitioner and holding inter alia that there is prima facie case for the offence under Sec.17 of N.D.P.S. Act against the petitioner.

8. Mr. Agrawal contended that the provisions of Sec.50 of the N.D.P.S.Act and other mandatory provisions of the Act have not been complied with when search was effected in the house of the petitioner. He relied on the judgment dt. June 14, 1991 rendered in Misc.

Criminal Application No.2454 of 1994, whereby this Court (Coram: C.V.Jani, J. as he was then) ordered to release the petitioner accused of that case on bail in view of the judgment of the Supreme Court in the State of Punjab Versus Balbir Singh ((1994) 3 SCC 299). Mr.Agrawal further submitted that the judgment of Gujarat High Court reported in 1995(2) G.L.R. 1709 in the case of State of Gujarat Versus Shaikh Lala Shaikh Balu, taking contrary view cannot be said to be a good law, as it relied upon the judgment dt. June 23, 1994 rendered in Criminal Appeal No. 526 of 1988 by the Division Bench of this court consisting of K.J.Vaidya J and B.J.Shethna, J as he was then), as the said judgment is over-ruled by the Supreme Court. Considering all these judgments, I am of the view that the submission of Mr.Agrawal is not acceptable, as reasoned hereinbelow.

9. The question before the court in the case of State of Gujarat Versus Shaikh Lala Shaikh Balu (Supra) was whether at the pre-trail stage of deciding the bail application for the alleged offence under Sec.20(b) of the N.D.P.S.Act, the court is justified in going into the technical questions such as (i) compliance of the mandatory provision of Sec. 42(2) and Sec.50(1) of the N.D.P.S.Act and (ii) regarding the possession of the house in question from where the muddamal contraband narcotic substance like opium was found out. It was further held that apart from the fact that the panchnama discloses that the raiding officer had complied with the concerned mandatory provisions of the Act. However merely because the raiding Officer has not stated so in the contemporaneous record. viz., F.I.R. or Panchnama, that by itself would not be sufficient at the pre-trial/bail stage to conclusively hold that he has not complied with the provisions contained in Sec.50(1) of the Act.

It is also held in Para 6 of the said judgment of State Vs. Shaikh Lala Shaikh Balu as follows :-

" As a matter of fact, it has been held by this Court (Coram: K.J.Vaidya & B.J.Shethna, JJ) in Criminal Appeal No. 526 of 1988, decided on 23-6-1994, wherein Shethna, J. speaking for the Bench has observed that so far as the procedural aspect of informing the accused is concerned, the same is an official duty and in view of Sec.114(e) of the Evidence Act, it should be presumed that he has performed that duty in ordinary course unless of course the said fact is challenged in the cross-examination of the

concerned officer and proved to the contrary. In this view of the matter, the learned Judge was once again patently wrong in releasing the accused on bail on the ground that the requirement of Sec.50(1) of the Act was not complied with."

10. It is true that the aforesaid ratio with regard to raising presumption in respect of official act under Sec.114(e) of the Evidence Act has been struck off by the Supreme Court in the judgment of Saiyad Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat, reported in 1995(2)G.L.R.1315, wherein the Supreme Court held that :

" Court is unable to share the High Court's view that in cases under the Act it is the duty of the Court to raise a presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Sec.50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Sec.50, the Court is duty-bound to conclude that the accused had not had the benefit of the protection that Sec.50 affords; that therefore, his possession of articles which are illicit under the N.D.P.S.Act is not established; that the precondition for his having satisfactorily accounted for such possession has not been met; and to acquit the accused".

11. Considering the aforesaid two judgments of State of Gujarat V/s Shaikh Lala (supra), it is clear that cancellation of bail is not only on the ground of presumption on basis of offcial duty, resorting to Sec.114 of the Evidence Act. What is held in the said judgment is that when the trial is yet to commence and as the mandatory provisions of the N.D.P.S.Act are complied with or not is yet to be determined, it cannot be conclusively held that the accused is entitled to benefit under such technical ground. In the present case, the panchnama as well as other material on the record do show that the Investigating Officer has complied with the mandatory requirements of the N.D.P.S.Act, by inquiring and asking the petitioner, if he wanted the search conducted and carried out in presence of Gazetted Officer or Magistrate to which the petitioner had declined. In this view of the matter and in facts and circumstances of the case, the learned Additional Sessions Judge has rightly concluded in Para 4 of his judgment that there is a prima facie case for the offence under Sec.17 of the

N.D.P.S.Act and that the mandatory requirements of the Act were complied with at the time of the search. Apart that, one cannot be oblivious of an important aspect of the case that the basic requirement of law under the N.D.P.S.Act is the involvement of the accused in an offence punishable under the N.D.P.S.Act. If the fact justified that there is material on record to disclose such involvement, then the provisions of Sec.37 of the N.D.P.S.Act will apply and the bail would normally have to be refused. The infirmities, if any, that can be anticipated at the time of the trial, are something hypothecated and are therefore,not something of which the court can take cognizance in advance as it would be a highly speculative approach while dealing with the bail application for the offence under the N.D.P.S.Act. In my view, this is not permissible under the law.

12. Mr.Agrawal has relied upon several authorities of various High Courts and this High Court [1995(1) Crimes 858, 1996(1) G.L.H. 317, 1995(2) Crimes 182, 1995(2) G.L.R. 1375, 1996(4) Crimes 144, 1994(1) Crimes 753, 1994(3) Crimes 456], taking view that the provisions of Secs. 42 and 50 etc. which are required to be mandatorily complied with can be looked into at the time of granting the bail. I have perused all these judgments minutely. However in view of the ratio laid down in the case of State of Himachal Pradesh Vs. Shri Pirthi Chand and another, 1996 Cr.L.J. 1354, the Supreme Court has laid down that the evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of the contraband under N.D.P.S. Act. Panchnama showing seizure of the contraband article from possession of the accused would be relevant. The Supreme Court concluded that at the stage of filing charge-sheet, it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Sec.50 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into. Under these circumstances,the discharging of accused after filing of the charge-sheet on the ground that mandatory requirements of Section 50 had not been complied with, was not proper. The ratio laid down by the Supreme Court in the said case of State of Himachal Pradesh Vs. Shri Pirthi Chand and another, is squarely applicable to the

facts and circumstances of the present case for what has been observed in the case of discharge of the accused for the offence under the N.D.P.S.Act on the ground of noncompliance of the mandatory provisions would squarely apply in the case of grant or refusal of the bail to the accused for the offence under the N.D.P.S.Act. This is the legal aspect of the case.

13. However factually, there are material on the record to suggest that there is prima facie case for the offence under Sec.17 of the N.D.P.S.Act against the accused person and that the mandatory requirements were complied with.

14. It was contended by Mr.Agrawal that the petitioner was not supplied the grounds of his arrest and as such there is violation of Article 22(1) of the Constitution of India and that there is violation of the provisions of Sec.100 of the Code of Criminal Procedure Code as the Police has not supplied the copy of the recovery memo. In the facts of the case, the search was effected in the house of the accused. It was made in his presence and on recovery of contraband substance, an explanation was sought for from him, whether he possessed any licence for keeping the opium. He said that he has no licence. Under the circumstances and on the basis of the material on record, it is abundantly clear that the petitioner knew as to why he was arrested. As regards supplying the copy of recovery of memo, the same has been supplied alongwith the papers of charge-sheet. I, therefore, do not see any substance or merit in this submission of Mr. Agarwal.

15. Mr.Agrawal then submitted that the possession of the opium in question cannot be said to be in conscious possession of the petitioner. What is the nature of the possession is yet to be determined at the time of trial. Suffice it to say that there is a prima facie case against the present petitioner. In that view of the matter, the petitioner is not entitled to be enlarged on bail.

16. Mr. Agrawal, learned advocate for the petitioner lastly submitted that in view of the conflicting judgments in the case of State of Gujarat Vs. Shaikh Lala Shaikh Balu reported in 1995(2) G.L.R. 1709 and judgment of Division Bench of this Court referred to therein with regard to the presumption of official act under Sec.114 and the same having been over-ruled by the Supreme Court in the case of Saiyad Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat reported in 1995(2)

G.L.R. 1315, the case must be referred to the Larger Bench. I am unable to accept this submission as the ratio laid down in the case reported in 1995(2) G.L.R. 1709 is not only on official presumption under Sec.114 of the Evidence Act. What is laid down by this court in the said judgment is that apart from the fact that the panchnama discloses that the raiding officer had complied with the concerned mandatory provisions of the Act. However merely because the raiding Officer has not stated so in the contemporaneous record. viz., F.I.R. or Panchnama, that by itself would not be sufficient at the pre-trial/bail stage to conclusively hold that he has not complied with the provisions contained in Sec.50(1) of the Act. There is, therefore, no question of referring the matter to the larger Bench, nor there are conflicting views in this behalf.

In view of the aforesaid, the application stands rejected. Rule discharged.
